United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

No. 74-2649

United States Court of Appeals
For the Second Circuit

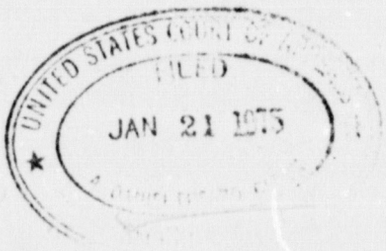
UNITED STATES OF AMERICA,
PLAINTIFF, APPELLEE,

v.

WILLIAM MARRAPESE, ET AL.,
DEFENDANT, APPELLANT.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR DEFENDANT-APPELLANT
(From Court's Denial Of Motion For New Trial Based Upon (1) Newly Discovered Evidence, And (2) Prosecutorial Suppression Of Material Evidence.)



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STATEMENT OF THE CASE

On June 14, 1973, the Federal Grand Jury sitting at Hartford, Connecticut returned an indictment against Robert Joost, David Guillette, William Marrapese and Nicholas Zinni charging each in three counts thereof with

violations of 18 U.S.C. Sections 241, 1503 and 884 (h) (1). (R. Vol. XIII, Doc. 13) (A. 7).

Numerous pre-trial motions were filed on behalf of all defendants, including Motions for pre-trial discovery and exculpatory evidence (A. 9, 10, 13). A motion to suppress was filed on behalf of defendant Guillette, and after a two day hearing and the filing of briefs, the Court denied the motion. On the twenty-fourth day of October 1973, trial was scheduled to commence against all four defendants before the Honorable T. Emmett Clairie sitting at Hartford, Connecticut. However, prior to jury selection, the Court granted the motions for severance by appellant Marrapese and co-defendant Zinni, and the trial proceeded against defendants Joost and Guillette only. Further pre-trial motions include additional motions for discovery and for exculpatory evidence by Appellant Marrapese (A. 18) and co-defendant Zinni. Their case was transferred by the Honorable T. Emmett Clairie, sitting at Hartford, to the Honorable Thomas F. Murphy, sitting at Waterbury, and the Marrapese-Zinni jury trial commenced June 4, 1974. On June 12, 1974 the jury returned verdicts of guilty on all three counts as to both Appellant Marrapese and co-defendant Zinni. A timely Motion For New Trial was filed, said motion being denied by the Court on June 26, 1974, and Appellant Marrapese and co-defendant Zinni were each then sentenced by the Court to life imprisonment on Count 1, 5 years imprisonment on Count 2, and 10 years imprisonment on Count 3, all to run concurrently. A Motion For A. New Trial based upon (1) Newly Discovered Evidence and (2) Prosecutorial Suppression of Material Evidence was subsequently filed by each defendant. On September 5 and 6, 1974 hearing was held on said motion, briefs were filed on September 13, 1974, and on October 24, 1974 the Court's 'Memorandum' denying the motion was filed (A. 59). A Motion To Submit Additional Evidence

on Defendant's Motion For A New Trial was filed on October 24, 1974 (A. 70), said motion informing the Trial Court that Lieutenant McDonald had testified at the New Trial Motion hearing of co-defendants Joost and Guillette on October 21, 1974 that neither Joost's nor Guillette's fingerprints were on the bomb device. On October 29, 1974 the Court denied the Motion stating therein "In denying the Motion we shall assume that Sgt. McDonald would testify substantially as indicated in the Motion." (A. 73). A Motion For A New Trial Based Upon This Additional Newly Discovered Evidence (Lieutenant McDonald's testimony on October 3, and 21, 1974 at the Joost-Guillette hearing) with the transcripts of said hearing annexed as exhibits 'A' and 'B' was filed on October 29, 1974. (R. Vol. I, II, III, Doc's A, 3-4) (A. 76). Timely notices of appeal have been filed by Appellants Marrapese and Zinni (A) from the Verdict, Judgment and Sentencing, and from the Court's denial of the Motion For A New Trial on the ground that the verdict was against the weight of the evidence and in the interest of justice (C.A. No. 74-1941), and (B) from the Court's denial of the Motion For A New Trial based upon (1) Newly Discovered Evidence, and (2) Prosecutorial Suppression of Material Evidence (C.A. No. 74-2649) (A. 74); (R. Vol. XIII, Doc. 52, and Vol. III, Doc. 5, respectively).

STATEMENT OF FACTS

A detailed analysis of both the Government and Defense case is set forth in "Appellant's Brief On Appeal From Judgment And Sentence", C.A. No. 74-1941, in "Question Presented Number One And Argument Thereon" pertaining to the Court's denial of defense motions for judgment of acquittal, to set aside the verdict, and for a new trial based upon the insufficiency of the evidence, and that the

verdict was against the weight thereof, pursuant to Rules 29 (a) (b) (c) and Rule 33 of the Federal Rules of Criminal Procedure. In the interest of brevity and to avoid duplicity, with permission of this Honorable Court, the facts as stated in "Question Presented Number One and Argument Thereon" are incorporated herein by reference from C.A. No. 74-1941.

Briefly, the Government's case consists of three parts: (1) the playing for the jury, while they read along from a transcription thereof, of a highly prejudicial and inflammatory tape recorded conversation, which occurred on March 31, 1972, between Daniel LaPolla, who had been secretly wired by A.T.F. Agents, and allegedly Appellant Marrapese, co-Appellant Zinni and certain other persons, wherein Appellant Marrapese allegedly declared an intention to dynamite the Brooklyn, Connecticut Jail. This was offered by the Government as "prior act or offense" evidence, and over defense objection, admitted into evidence by the Trial Court. (See Issue Presented Number Two and Argument Thereon in C.A. No. 74-1941).

(2) Testimony of the principal Government witness, John Anthony Housand, to his alleged association with the named defendants between April and June 1972, including his presence at an alleged 15 minute 'conspiratorial' meeting commencing at approximately 10:00 a.m. at Carter's Jewelry Store, Cranston, Rhode Island, wherein he was allegedly hired by the named defendants to shoot Daniel LaPolla for the sum of $5,000.00.

(3) Testimony from various witnesses concerning attempts between May and September 1972 to locate Daniel LaPolla by co-defendants Joost and Guillette, Appellant Marrapese, his attorneys, Andrew Bucci and John O'Neill, and a private investigator, Robert Joyal, hired to do so by Attorney Andrew Bucci.

Briefly, the Defense case consisted of several parts:

(1) Cross examination of the Government's principal witness, John Anthony Housand, to illustrate:

(a) his lack of integrity and credibility, as indicated by his lengthy criminal record of offenses relating directly to fraud and misrepresentation such as forgery and larceny, coupled with his admissions of earning his livelihood for many years by the use of numerous aliases, and by fabrication and misrepresentation, both orally and by forged documents.

(b) his motive to fabricate, as indicated by numerous promises made to him by the Government including monies and to appear on his behalf before the Parole Board at a time when he had spent the better part of eight years in prison for various offenses and had just been sentenced to an additional six year term.

(c) the numerous inconsistencies existing between his trial testimony in June 1974, and that of his testimony at prior proceedings, and his written statements, and the testimony of other defense witnesses.

(2) Testimony of a number of the most credible defense witnesses, together with certain documentary exhibits, to prove conclusively that Mr. Housand's bizarre story of a 'conspiratorial' meeting having occurred around 10:00 a.m. on Monday morning, May 8, 1972 at Carter's Jewelry Store, Cranston, Rhode Island was absolutely false, since Attorney Andrew Bucci, Appellant Marrapese, and co-defendant Zinni were in the Providence Superior Courthouse from shortly before 10:00 a.m. to noontime on May 8, 1972. These witnesses included Superior Court Judge John S. McKiernan (former Lieutenant Governor of Rhode

Island for ten years), a Rhode Island Senator, five lawyers, the stenographic court reporter, two police officers, one being Detective Fuina, the investigating officer in the Providence Superior Court case, and 'Police Officer of the Year' in 1972. In addition, the evidence revealed that the alleged locale of the supposed meeting, Carter's Jewelry Store, was no longer in business on May 8, 1972.

Appellant Marrapese's main contention in this Appellant's Brief, C.A. No. 74-2649, is that the Prosecution suppressed material evidence by not revealing pre-trial to Appellant Marrapese or his counsel that a Government fingerprint expert, Lieutenant James McDonald of the Connecticut State Police, had found three "IDENTIFIABLE" partial latent fingerprints on the bomb device.

QUESTION PRESENTED AND ARGUMENT THEREON

DID THE TRIAL COURT'S ERROR IN DENYING APPELLANT MARRAPESE'S MOTION FOR A NEW TRIAL BASED UPON (1) NEWLY DISCOVERED EVIDENCE, AND (2) SUPPRESSION OF MATERIAL EVIDENCE BY THE PROSECUTION RESULT IN A VIOLATION OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Prior to the trial of Joost and Guillette in December 1973, defense counsel for all four defendants moved for discovery and for exculpatory evidence. [Marrapese (A. 9, 10, 13), (R. Vol. XIII, Doc's 17-22, 24, 27-34, 37, 42)]. Pertaining to reports of fingerprint examination, the prosecution furnished a report dated November 20, 1972 of A.T.F. Agent Anthony Varcos stating his opinion that latent prints lifted from the bomb device found at the scene of the explosion were "UNIDENTIFIABLE". (A. 81) Subsequent to the Joost-

Guillette trial but prior to the Marrapese-Zinni trial in June 1974, Mr. Daniels, new defense counsel for Marrapese in place of Attorney Andrew Bucci, and Thomas Zinni, new defense counsel for defendant Zinni in place of Attorney John O'Neil, filed additional motions for discovery and exculpatory evidence (A. 18). The discovery motions requested all scientific reports made in connection with the case, within the possession, custody or control of the Government, the existence of which is known, OR BY THE EXERCISE OF DUE DILIGENCE MAY BECOME KNOWN TO THE ATTORNEY FOR THE GOVERNMENT [Marrapese — R. Vol. XIII, Doc's 47, 51)]. However, no scientific reports of any kind were furnished by the Government to either counsel. The defense were at no time furnished a report of one Sergeant James McDonald, fingerprint expert of the Connecticut State Police, dated October 3, 1972, which stated that in his expert opinion there were three "IDENTIFIABLE" latent partial prints found on the bomb device (A. 82), nor was this information orally communicated to defense counsel or revealed in any way. During cross examination of A.T.F. Agent Werenik at the Marrapese-Zinni trial in June 1974, when asked if prints had been found on the bomb device he first mentioned the name of Sergeant James McDonald of the Connecticut State Police as the person who had lifted said prints and stated that they were in Sergeant McDonald's possession (Tr. 65-67) (A. 20, 21). This was the first time that counsel for Marrapese or Zinni had ever heard of Sergeant McDonald, relying instead upon a report in the name of A.T.F. Agent Anthony Varcos. Defense counsel proceeded to question other witnesses in this regard and finally the prosecution called Sergeant McDonald to the stand. [At the hearing at the Motion for New Trial based upon suppression of evidence, Mr. Coffey, the prosecuting attorney, admitted that the only reason he called Sergeant McDonald to testify

at the Marrapese-Zinni trial was because of Mr. Daniels' questioning and to avoid adverse defense argument to the jury in this regard (MNT Tr. 102) (A. 21). It is respectfully suggested that the prosecution would appear to have been forced into disclosure, since Sergeant McDonald was not called by the prosecution to testify at the prior trial of Joost and Giullette in December 1973)]

At the Marrapese-Zinni trial in June 1974, Sergeant McDonald, then Lieutenant McDonald, Commanding Officer of the Connecticut State Police Crime Lab, Bethany, Connecticut, and a fingerprint expert for 27 years (Tr. 758) testified to being at the bomb scene at Oneco on September 29, 1972, and lifting latent prints from the battery and tape portions of the bomb device found at the scene (Tr. 760). He testified that in his opinion there were three "IDENTIFIABLE" partial latent prints found on this bomb device (Tr. 766-767) (A. 22), and that he, at that time requested that "major" fingerprinting be done of the defendants (Tr. 784), because, as he explained, the prints on the bomb device were of an area of the hand between the fingers which is not normally printed during routine fingerprinting of suspects (Tr. 762) (A. 22). He was aware that subsequently and pursuant to a Court Order the defendants and one Edward Sitko submitted to additional "major" fingerprinting in Lieutenant McDonald's presence at the Federal Courthouse, Hartford, Connecticut (Tr. 784) (A. 23). [At the hearing on September 5 and 6, 1974 on defendants' Motion For A New Trial based on the prosecution's suppression of material evidence, Lieutenant McDonald testified that the prints were rolled by A.T.F. Agent Varcos on October 12, 1972 in his presence, and that the "major" prints were smudged during the printing process (MNT Tr. 198, 199)]. When Lieutenant McDonald stated at the Marrapese-Zinni trial during cross-examination by Mr. Daniels that he could compare the three

"Identifiable" latent partial prints from the bomb device if Marrapese and Zinni submitted to giving new "major" fingerprint samples in court, the defendants made such a request (Tr. 769) (A. 24), and over the noon recess this was done. Following the noon recess, Lieutenant McDonald testified that after having compared the "identifiable" latent partial prints from the bomb device with the new "major" fingerprint samples, in his expert opinion the prints on the bomb device are not those of Marrapese or Zinni (Tr. 801) (A. 24). However, before Lieutenant McDonald left the witness stand at the Marrapese-Zinni trial, the Court stated to him (Tr. 801) (A. 24):

> Q. Court: And why have you not eliminated Guillette and Joost; because you didn't take the side prints?
>
> A. Yes, sir.

It is of the utmost importance to note at this point that on October 21, 1974, in the United States District Court, Hartford, Connecticut, at the hearing on Joost and Guillette's motion for a new trial due to prosecutorial suppression of material evidence, Lieutenant McDonald, having two weeks earlier been furnished with new "major" fingerprint samples by Joost and Guillette for comparison purposes, testified that based upon comparisons he made, in his opinion, the three "identifiable" latent partial prints on the bomb device are also not those of either Joost or Guillette. (MNT Tr. 10/21/74, p. 200; R.—MNT Vol. II, Doc. No. 2, p. 200; A. 25).

At the conclusion of the Marrapese-Zinni trial, defense counsel for Marrapese argued to the jury that there was no evidence that either Marrapese or Zinni had "used an explosive at Oneco, Connecticut, on September 29, 1972", and that Lieutenant McDonald had testified that their

prints were not on the bomb device. In rebuttal argument the prosecutor argued that Guillette had the electrical expertise, and that the Government had never contended that either Marrapese or Zinni made the bomb device, but rather that they acted in a "managerial" capacity or manner (Tr. 1610-11) (A. 25, 26). Thus, the prosecutor stated, in effect, that Guillette, shown by the Government evidence to have the expertise in electrical components and home made burglar alarm systems, a form of anti-intrusion device, had made the bomb as the agent of, and under the "management" of Marrapese and Zinni. Therefore, if the defense could have shown to the jury before the completion of all the evidence, that neither Guillette nor Joost's prints were on the bomb device, this would have been weighty evidence to rebut the so-called "agency" or "managerial" theory of the prosecution. And the Government went even further in its argument to the jury in closing off the possibility that someone other than the four named defendants had committed this crime by arguing to the jury that in the entire world only these four defendants had a motive to kill Daniel LaPolla [(Tr. 1605-6) (A. 26); (MNT Tr. 162) (A. 27); (163) (A. 28.)]

The hearing on Marrapese and Zinni's Motion for new trial based upon (1) newly discovered evidence and (2) prosecution suppression of material evidence was held on September 5 and 6, 1974. Testimony was given by the prosecuting attorney, Mr. Petrella (overall case agent in charge) and Varcos (fingerprint expert), Harry S. Gaucher, Jr., State prosecuting attorney for Windham County, Connecticut, Lieutenant McDonald, State fingerprint expert, Connecticut State Trooper John Burke, Jr., and Hubert Santos, defense counsel for Guillette.

For the most part, with some exceptions, the various witnesses were in agreement as to the facts. Lieutenant McDonald, fingerprint expert engaged in fingerprint analy-

sis since 1946 (MNT Tr. 175) was at the scene of the explosion at Oneco, Connecticut on September 29, 1972 (MNT Tr. 178). A.T.F. Agent Weronik, the agent in charge of collecting the physical evidence (MNT Tr. 11, 19, 71), instructed the Sergeant McDonald to inspect the material at the scene for fingerprints, he and McDonald working jointly, Weronik states (MNT Tr. 12) (A. 28). This was a joint State and Federal investigation with respect to this entire matter, prosecutor Coffey testified (MNT Tr. 108) (A. 29), he himself communicating with District Attorney for Windham County, Harry Gaucher, the States attorney in charge of this case (MNT Tr. 108) (A. 29). On the evening of September 29, 1972, Sergeant McDonald lifted three "identifiable" latent partial prints from the bomb device (MNT Tr. 180) and orally stated his findings to his superior officer, Major Ragazzi of the Connecticut State Police, to an unidentified A.T.F. Agent (MNT Tr. 181, 182, 185) (A. 29), (Tr. 186) (A. 30), and to Danielson State Police barracks personnel, State Troopers Burke and Veillette (MNT Tr. 221) (A. 30). Lieutenant McDonald agrees that this was an important discovery and one that he would not keep from his superiors, the U. S. Attorney's office, or any agent of the Federal Government (MNT Tr. 254, 255) (A. 31, 32). A.T.F. Agent Weronik admits he was then present, denies McDonald told him that the "prints looked good," and "that they were prints he could work with" (MNT Tr. 16) (A. 33), (Tr. 17, 24, 25) (A. 36), and Lieutenant McDonald was permitted to take the bomb device back with him to the State Crime Lab at Bethany for further examination (MNT Tr. 13). Agent Weronik states he gave to his immediate superior, Mr. Coffey, the prosecutor, a written report and numerous oral reports as the investigation progressed (MNT Tr. 18) (A. 33), mentioning to Mr. Coffey, as well as everyone else involved in the case possibly

several times, that Lieutenant McDonald said that "the prints looked good" (MNT Tr. 18) (A. 33), (Tr. 48) (A. 34). Mr. Coffey concedes that within a week after Mr. LaPolla's death, Agent Weronik informed him that Sergeant McDonald had found prints on the bomb device "that he could work with", but he doesn't recall whether the word "identifiable" was used (MNT Tr. 75) (A. 35). Agent Weronik states he contacted Sergeant McDonald almost on a daily basis between October 3 and 12, 1972, during which period of time Lieutenant McDonald was furnished fingerprint sample cards of the four defendants that were on file with the A.T.F. (MNT Tr. 23, 24) (A. 35, 36). But these routine fingerprint cards did not contain those areas of the inside portions of the fingers comparable to the three "identifiable" latent partial prints found on the bomb device. As a Result, Lieutenant McDonald Wrote His Report Dated October 3, 1972 Defendant's Exhibit A (MNT Tr. 188) Which Stated (a) That He Had Found Three "Identifiable" Partial Latent Prints on the Bomb Device and (b) his request for "major" fingerprint samples of the defendants and Edward Sitko (MNT Tr. 182). Lieutenant McDonald testified that he informed Agent Weronik that he had found three "identifiable" fingerprints on the bomb device and that the routine fingerprint cards furnished to him were insufficient to make a thorough comparison and examination (MNT Tr. 192, 193) (A. 36), (Tr. 254) (A. 31). Mr. Coffey admits that he asked Agent Weronik to go to the Crime Lab at Bethany to get Lieutenant McDonald's conclusions and results (MNT Tr. 81) (A. 37), and Agent Weronik told him that Sergeant McDonald stated that he might be able to make a positive comparison if he had the proper prints from the defendants and Edward Sitko (MNT Tr. 88, 89) (A. 37). Lieutenant McDonald testified that he has never been asked by Agent Weronik whether he was going to

make up or file a report in this matter (MNT Tr. 229), and the practice at the crime lab at that time was to communicate such a finding orally and only submit the written report on request, which request was never made (MNT Tr. 223, 229). Consequently, he did not give a copy of his October 3, 1972 written report to any one (MNT Tr. 191, 260), instead placing it in his file on the case where it remained from October 3, 1972 until the time he testified at the Marrapese-Zinni trial in June 1974 (MNT Tr. 267). On October 12, 1972 Mr. Coffey moved in the U. S. District Court at Hartford for a Court Order for "major" fingerprint samples of the defendants and Edward Sitko, the Order issuing, and samples being given on that same date and location (MNT Tr. 84) (A. 38). A.T.F. Agent Varcos was called to the Federal Courthouse by Mr. Coffey and took the "major" fingerprint samples in Lieutenant McDonald's presence, and from 10 a.m. to 5 p.m. on October 12, 1972 Lieutenant McDonald compared the three "identifiable" latent prints from the bomb device with the "major" fingerprint samples of the four defendants and Edward Sitko which included palm prints and the inner side areas of all the fingers (MNT Tr. 197, 199, 242). Lieutenant McDonald testified that immediately preceding his comparison examination on October 12, 1972 he and prosecuting attorney Paul Caffey went into the room where he was going to make the comparisons, and he laid the lifts from the bomb device on the desk and told Mr. Coffey "that these are the "IDENTIFIABLE" latent prints I'd be working with" (MNT Tr. 247, 248) (A. 38, 39), (Tr. 257) (A. 39), and that during his examination and comparison every so often he would exit from the room and report how he was doing to Mr. Coffey, who was in the adjoining room (MNT Tr. 245, 246) (A. 39, 40). Lieutenant McDonald states that contrary to his request, A.T.F. Agent Varcos "rolled" the prints instead of "lay-

ing" the inside of the fingers on the card, and used an ink pad instead of printer's ink, so the "major" fingerprints of the defendants became smudged as a result (MNT Tr. 198, 199) and that he informed A.T.F. Agent Varcos at that time and A.T.F. Agent Weronik later of his difficulty in comparison because of the smudged "major" fingerprint cards (MNT Tr. 249, 250). Mr. Coffey, the prosecuting attorney, admitted in his testimony that he was present on October 12, 1972 at the Federal Courthouse in the Grand Jury room and on two or three occasions he went into the room that Lieutenant McDonald and A.T.F. Agent Varcos were in to ask them if they needed any further assistance of the Grand Jury and to ask them how things were going (MNT Tr. 387), and when he asked Lieutenant McDonald how he was making out with the comparison of the prints, Lieutenant McDonald said that "things are going fine" (MNT Tr. 388) (A. 76). Mr. Coffey then conceded the following in his testimony: (MNT Tr. 389) (A. 41).

> Q. All right. Then when he said everything is going fine, this indicated to you that HE HAD PRINTS THAT HE WAS WORKING WITH THAT WERE SUFFICIENT FOR COMPARISON PURPOSES?
>
> A. That's what I took—
>
> Q. THAT INCLUDES the fingerprint sample cards which have just been ordered and taken, as well as THE LIFT FROM THE BOMB?
>
> A. THAT'S WHAT I TOOK IT TO MEAN.
>
> (Emphasis by Appellant Marrapese)

A.T.F. Agent Anthony Varcos, federal fingerprint expert (MNT Tr. 281) testified that he was first called into the investigation on October 12, 1972 (MNT Tr. 281, 282) to the Federal Courthouse, Hartford, arriving around

10 - 11 a.m., Mr. Coffey telling him that he was called there to fingerprint some persons (MNT Tr. 283). Agent Varcos stated that he met Sergeant McDonald there at that time, who told him that he had a latent print from the bomb device that was "identifiable" and also what parts of the hands he wanted printed (MNT Tr. 284) (A. 41). Lieutenant McDonald showed him a photograph of the latent "identifiable" print which he had with him (MNT Tr. 284, 294) (A. 41, 42). After Agent Varcos took "major" fingerprint samples of the defendants and Edward Sitko (MNT Tr. 285, 286) he turned the fingerprinting sample cards over to the Grand Jury who, in turn, turned them over to Lieutenant McDonald (MNT Tr. 286, 287) who signed a receipt for them, Defendant's Exhibit B (MNT Tr. 202) and took them with him back to the State Lab at Bethany for further comparison analysis. After this date Lieutenant McDonald complained to Agent Weronik about the smudged "major" fingerprint sample cards (MNT Tr. 54, 55), Agent Weronik admitting in his testimony that it may have been discussed between he and Mr. Coffey as to whether Mr. Coffey would request the Court to have the defendants give further "major" fingerprint samples (MNT Tr. 62).

Lieutenant McDonald had the latent fingerprints all through the month of October 1972 and Agent Weronik contacted him almost daily to find out how he was progressing with his work (MNT Tr. 33). Agent Weronik testified "Naturally, this was a very important piece of evidence, a latent fingerprint, as far as trying to identify the perpetrators. And we had most of our agents more or less waiting around as to what his answer would be" (MNT Tr. 33) (A. 42). Lieutenant McDonald's answer t, him was "I'm still working on it," so they contacted A.T.F. Agent Varcos and on November 8, 1972 it was

decided that A.T.F. Agent Varcos would work together with Lieutenant McDonald (MNT Tr. 34) (A. 43).

Mr. Coffey in his testimony also agreed that an important piece of evidence to both the prosecution and the defense, "to both sides", would have been the identity of the person or persons who placed the prints on the bomb device (MNT Tr. 127) (A. 43), (Tr. 154) (A. 44), and that two prosecution experts, A.T.F. Agent Varcos and State Police Sergeant McDonald were used by the Government to attempt to identify the suspect or suspects (MNT Tr. 127) (A. 43). Mr. Coffey testified on several occasions between October 13 and early November 1972. Mr. Coffey asked A.T.F. Agent Weronik how Lieutenant McDonald was doing and he was told that it was a time consuming process which required Lieutenant McDonald to look at a section of the fingerprints for a short period of time and then leave it if his eyes got tired. As a result, Mr. Coffey asked A.T.F. Agent Weronik to get A.T.F. Agent Varcos to help Lieutenant McDonald (MNT Tr. 87, 88). Mr. Coffey states that he knew that A.T.F. Agent Varcos and Lieutenant McDonald were getting together around November 13, 1972 (MNT Tr. 95).

Lieutenant McDonald testified in this regard that around the middle of November 1972, he went on a hunting vacation, but he left his complete file on the case, which consisted of one 8" x 11" manila folder, at State Police Crime Lab, available to access by the A.T.F. Agents on the case, and with a note attached stating "here's the file, help yourself" (MNT Tr. 206) (A. 44). This 8" x 11" manila folder contained his entire file, including his October 3, 1972 report, which as previously mentioned, stated that he had found three "identifiable" partial latent prints on the bomb device (MNT Tr. 207) (A. 45).

A.T.F. Agent Varcos testified to receiving two telephone calls from Agent Weronik, the first during the latter part

of October and the second on November 8, 1972 informing him of a joint meeting on November 13, 1972 with Lieutenant McDonald at the State Crime Lab in order that they examine the prints together (MNT Tr. 288, 289) (A. 45, 46). He was aware at that time that there was latent partial "IDENTIFIABLE" prints found on the bomb device since Lieutenant McDonald told him that he had them (MNT Tr. 288, 289) (A. 45, 46). However, on November 13, 1972 when he arrived at the State Crime Lab, Lieutenant McDonald had gone on a hunting vacation but he was furnished with Lieutenant McDonald's file on the case (MNT Tr. 290, 291) and he spent three days at the Crime Lab working on the fingerprint evidence (MNT Tr. 295). An assistant at the Crime Lab also told him that Lieutenant McDonald believed he could identify two or three of the latent prints (MNT Tr. 300, 303, 324). Agent Weronik also testified he told Agent Varcos between October 12 and November 8, 1972 that Lieutenant McDonald said "the prints looked good" (MNT Tr. 37) (A. 47). Agent Varcos wrote his report dated November 20, 1972 stating that in his opinion the latent prints were "unidentifiable". Defendant's Exhibit C (MNT Tr. 296, 298). Agent Weronik testified that he brought Agent Varcos' report to Mr. Coffey's attention at that time (MNT Tr. 47, 48) (A. 34). Mr. Coffey testified to receiving such report and having a conversation with Agent Weronik concerning such report (MNT Tr. 96). [It is indeed strange that with the zeal with which this investigation was conducted, that the Government would abandon the opinion of an expert, whose opinion it was that these prints were "identifiable" or "looked good", when all concerned agreed that the identification of these prints was an important piece of evidence to both the prosecution and defense.]

In his testimony Mr. Coffey admitted that prior to the trials of defendants Guillette, Joost, Marrapese and Zinni,

the defense filed motions for discovery under Rule 16 of the Federal Rules of Criminal Procedure and for exculpatory evidence on behalf of all defendants (MNT Tr. 125, 126) (A. 47), the motions for discovery specifically requesting the results of reports of physical evidence within the possession, custody or control of the Government, the existence of which is known or By the Exercise of Due Diligence May Become Known to the Attorney for the Government. (MNT Tr. 126) (A. 47). Mr. Coffey concedes that when he received these defense motions that other than merely checking with A.T.F. Agents Petrella, Weronik and Watterson and bomb expert Gleason to get their reports to determine what scientific evidence had to be disclosed (MNT Tr. 126-7), he at no time ever personally or through his agents exercised any due diligence to contact Lieutenant McDonald by telephone, letter or otherwise in order to determine if he had ever prepared any reports (MNT Tr. 128, 131) (A. 48). In this regard he states:

> Q. All right. Now, did you personally exercise any due diligence in any way, shape or form to determine from Officer McDonald of the Connecticut State Police whether, in fact, he had ever prepared a report, when you first received these discovery motions?
>
> A. No, I never communicated with Sergeant McDonald.

Also, Mr. Coffey conceded in his testimony that he did not instruct A.T.F. Agent In Charge Petrella or any of the assistants he had working with him at the time to contact Lieutenant McDonald to see if he had made a report (MNT Tr. 131) (A. 48). He never wrote to Lieutenant McDonald or the State Police to obtain any fingerprint report Lieutenant McDonald may have made, nor did he dispense anyone to Lieutenant McDonald's office to obtain

a written report from him or from the State Police (MNT (Tr. 92) (A. 49).

Pursuant to the discovery order, Mr. Coffey did not furnish to any defense counsel (a) Lieutenant McDonald's October 3, 1972 report stating that in Lieutenant McDonald's opinion he had found three "identifiable" partial latent prints on the bomb device, nor (b) even any oral information that in Sergeant McDonald's opinion the prints were "identifiable" or "looked good" or were prints he could "work with." Instead, Mr. Coffey furnished to the defense A.T.F. Varcos' report of November 20, 1972 which stated that these latent prints were, in his opinion, "unidentifiable" (MNT Tr. 130, 148) (A. 49), upon which opinion the defense relied. (MNT Tr. 335) (A. 50).

Lieutenant McDonald further testified that a day or so prior to October 3, 1972 (one year following his original report of October 3, 1972) he received a telephone call from a person who identified himself as Mr. Santos, the defense attorney for defendant David Guillette (MNT Tr. 213), requesting photographs of any fingerprints which may have been found during the investigation (MNT Tr. 213). Lieutenant McDonald testified that while he would certainly always give his evidence to law enforcement officers (MNT Tr. 215) (A. 50), he would give the defense nothing without a Court order (MNT Tr. 215) (A. 50), and he stated to Mr. Santos his refusal. However, Lieutenant McDonald testified, that while he couldn't remember the exact telephone conversation (MNT Tr. 278), he did tell Mr. Santos that he had found three "identifiable" partial latent prints on the bomb device (MNT Tr. 260-1), but that he did not tell Mr. Santos that he had an October 3, 1972 report stating this opinion (MNT Tr. 261). (Neither Attorney Daniels nor Attorney C. Thomas Zinni were counsel for any defendant at this time.) He produced a letter, defendant's Exhibit E (MNT Tr. 217, 262) dated October 3, 1973 from

Mr. Santos requesting copies of any photographs of any fingerprints (MNT Tr. 213-4). Lieutenant McDonald, however, turned over the photographs of the fingerprints to A.T.F. Agent Weronik at the State Police Lab in late October 1973 (MNT Tr. 214, 262, 263).

Mr. Coffey testified that he furnished to Mr. Santos only, and not to other defense counsel, photographs of the latent fingerprints and the fingerprint cards of the defendants, since Mr. Santos had indicated to him that he was the defense counsel who was coordinating the physical aspect of the defense investigation (MNT Tr. 148).

However, Hubert Santos, defense counsel for co-defendant Guillette (MNT Tr. 332) testified and contradicted both Lieutenant McDonald and Mr. Coffey in certain regards. Mr. Santos in his testimony denied that Lieutenant McDonald had ever told him that he had found three "identifiable" prints on the bomb device (MNT Tr. 332-3) (A. 50), (Tr. 358) (A. 55), and for copies of the latent prints found at Oneco, Lieutenant McDonald said that Mr. Santos would have to check with Mr. Coffey (MNT Tr. 331-2) (A. 50). Mr. Santos wrote a letter to Lieutenant McDonald dated October 3, 1972 requesting copies of photographs of any fingerprints found during the investigation (MNT Tr. 331), and prior to the trial of Joost and Guillette, Mr. Coffey furnished Mr. Santos with photographs of the partial latent prints found on the bomb device and copies of the fingerprint sample cards of the defendants (MNT Tr. 340-1). But, Mr. Santos states he was at no time furnished with Lieutenant McDonald's October 3, 1973 report which stated that Lieutenant McDonald had found three "identifiable" fingerprints on the bomb device until after the completion of the trial of Marrapese and Zinni in June 1974 (MNT Tr. 335-6) (A. 50, 52), nor was Mr. Santos ever informed by Mr. Coffey or any member of the prosecution or law enforcement agency that Lieuten-

ant McDonald had, in fact, found three "identifiable" partial latent prints on the bomb device (MNT Tr. 335) (A. 50). This information first became known to the defense subsequent to the trial, conviction and sentencing of co-defendants Joost and Guillette, and during the trial of Appellant Marrapese and co-defendant Zinni (MNT Tr. 335) (A. 50). During the latter trial Mr. Santos states he received a telephone call from Attorney O'Neill, he believes, and at the conclusion of the Marrapese-Zinni trial, Mr. Coffey delivered to him in the Federal Public Defenders Office, Hartford, a copy of Lieutenant McDonald's October 3, 1972 report (MNT Tr. 335) (A. 50). Mr. Santos further testified that at no time did he show these photos of the three prints lifted from the bomb device to attorneys for Appellant Marrapese or co-defendant Zinni, or to Appellant Marrapese himself or co-defendant Zinni, but only to Mr. Wade, Attorney for co-defendant Joost (MNT Tr. 353-357) (A. 52-55). In fact, there came a point where it was believed that there was a conflict of interest between defendants Guillette and Marrapese and Zinni (MNT Tr. 353) (A. 52). [This is substantiated by the motions brought by co-defendants Joost and Guillette pursuant to this Court's ruling in *United States* v. *Mele*, 462 F.2d 918 (2nd Circ. 1972), wherein counsel for Joost and Guillette sought to discover if any co-defendant was co-operating with the Government as an informant]. Mr. Santos stated that he relied completely upon the November 20, 1972 report of A.T.F. Agent Varcos furnished to him by the prosecuting attorney, Mr. Coffey, which report, as previously mentioned, stated that the prints found on the bomb device were "unidentifiable". (MNT Tr. 335) (A. 50). Mr. Santos denied that his function was to collect tangible evidence for all defense attorneys (MNT Tr. 355, 358) (A. 54, 55) and testified that his function was to prepare the defense for the "Noblemet evidence," which was

evidence offered by the prosecution of a break-in at the Noblemet Refinery, Manville, Rhode Island wherein dynamite was allegedly used, as so-called 'prior act or offense evidence,'' (MNT Tr. 356-7) (A. 54, 55).

Mr. Santos further testified that upon his motion during the course of the trial he was furnished some 9-12 names by I.R.S. Agent Smith of persons against whom Daniel LaPolla had given information pertaining to the criminal activities of such persons (MNT Tr. 337, 338) (A. 55). And, that had he received the information from Lieutenant McDonald that, in his opinion there were three ''identifiable'' latent partial prints on the bomb device, prior to the trial of co-defendants Joost and Guillette, he would have utilized this information in preparation for the forthcoming trial. Attorney Santos states:

> ''Had I been aware of this fact, I would have submitted to as many fingerprint experts in Connecticut and the country that we could find, the latent prints at Oneco and the fingerprint cards of the four co-defendants; to as many experts as possible, in an attempt to secure an opinion that the identifiable prints found at Oneco did not match the prints of any of the four co-defendants on trial.'' (MNT Tr. 334-5) (A. 56).

The trial of Joost and Guillette commenced October 23, 1973 (MNT Tr. 333).

In this regard, Mr. Coffey testified that during the course of the trial of Joost and Guillette there was a defense motion made to produce the names of a number of people that Mr. LaPolla had given information about their criminal activities. (MNT Tr. 155) (A. 57). And pursuant to that defense motion, Federal I.R.S. Agent Smith furnished to Mr. Santos a number of names. (MNT Tr. 156) (A. 57).

Mr. Coffey admits that he did not request these named individuals to have their fingerprints taken, nor seek a court order for this purpose. (MNT Tr. 162) (A. 27). Mr. Coffey admits that he concluded that no one other than the defendants had a motive to kill Daniel LaPolla, and that, in fact, this is what he argued to the jury at the Marrapese-Zinni trial, in sum and substance, that nobody else in the world had a motive to kill Daniel LaPolla except these four men. (MNT Tr. 162, 163), (A. 28). Mr. Coffey further admits, however, that even as of the date of his testimony although he is in possession of Lieutenant McDonald's report stating that the latent prints are "identifiable" no one from the Government has made any comparison with the fingerprints of the number of suspects against whom Mr. LaPolla has given information (MNT Tr. 157-8) (A. 28), or anyone else. Mr. Coffey concedes that only the four defendants are named in the indictment, the motive in the case being the deprivation of Mr. LaPolla's civil right to testify against them in the trial involving the theft of the automatic rifles. (MNT Tr. 158).

Mr. Coffey testified further that immediately after the Marrapese-Zinni trial ended in June 1974 Mr. Coffey directed that a meeting be held in his office the following Monday with A.T.F. Agents Varcos, Petrella and Wesnik, State Police Officer Veillette and Lieutenant McDonald present with respect to Lieutenant McDonald's testimony that the prints from the bomb device were "identifiable" and A.T.F. Agent Varcos' opinion that they were "unidentifiable" (MNT Tr. 97, 98, 105). In his testimony Lieutenant McDonald testified that at this meeting he indicated to the others present that he had found 33 points of identification on one latent print and 17 on another, and remained firm in his opinion that the latent prints

from the bomb device are "identifiable." A.T.F. Agent Varcos disagreed (MNT Tr. 233-4).

Following this meeting A.T.F. Agent Varcos drafted and personally typed another report bearing only his signature as the 'undersigned' (MNT Tr. 312) and dated June 18, 1974. This report was marked both defense Exhibit 'D' and prosecution Exhibit Number 1. In this report as to finding number 2, he therein stated:

> "Exhibit 4 and 6 were determined to be the same latent print and upon re-examination it was determined THERE WAS A SUFFICIENT NUMBER OF CHARACTERISTICS APPEARING ON THE LATENT PRINT TO MAKE AN IDENTIFICATION POSSIBLE. IT IS ALSO THE OPINION OF THE UNDERSIGNED THAT the latent print in question is, in fact, a combination of ridges from two separate areas of the fingers and/or palms." (Emphasis added by appellant Marrapese). (MNT Tr. 313) (A. 83).

When confronted with the statement that he obviously has changed his opinion and now believes the prints to be "identifiable" Agent Varcos' only explanation is that the first sentence stating, in effect, that the print is identifiable, is Lieutenant McDonald's opinion and the second sentence is his opinion (MNT Tr. 306). However, he admits that he is the only person who signed as the 'undersigned,' and Lieutenant McDonald is never mentioned anywhere in the report nor does it bear Lieutenant McDonald's signature as the 'undersigned' (MNT Tr. 312), and that a reading of the above indicates that both sentences are the opinion of the 'undersigned' Agent Varcos (MNT Tr. 314) (A. 58). He states that he still disagrees with Lieutenant McDonald's opinion that the prints are "identifiable" but he adds "but that doesn't say that his opinion is not correct." (MNT Tr. 315).

Based upon the foregoing statement of the facts and

the applicable law, the Appellant Marrapese respectfully contends that the prosecution's suppression of material evidence, to wit, the October 3, 1972 report of Lieutenant McDonald, and the information that Lieutenant McDonald was of the opinion that there were three "identifiable" partial latent prints on the bomb device, deprived the Appellant Marrapese of due process of law, and therefore, the Trial Court's ruling, denying Appellant Marrapese's Motion For A New Trial based upon this ground constituted error.

LAW

The primary exposition of constitutional dogma on this issue is the teaching of *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) at 87, that "the suppression of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

In *United States* v. *Keogh*, 391 F.2d 138, 146, 147 (2nd Cir. 1968), Judge Friendly defined three classes of cases involving suppression of evidence by the Prosecution. (1) The first is where the suppression is "deliberate" either (a) by design or (b) where the prosecution has failed to disclose 'evidence whose high value to the defense could not escape the prosecutor's attention.' (2) In the second class, suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment without regard to the good or bad faith of the prosecution. In such cases, the prosecution has been put on notice and there is a duty that the prosecutor make a careful check of his files to obtain such evidence. (3) The third class consists of those cases in which suppression was not deliberate, and

no request was made, but the benefit of hindsight indicates "that the defense could have put the evidence to not insignificant use." *United States ex rel. Rice* v. *Vincent*, 491 F.2d 1326 (2nd Circ. 1974).

The standard by which the conduct of the prosecution must be measured was set forth in *Brady* v. *Maryland* (supra) at 87 and reiterated in *Moore* v. *Illinois*, 408 U.S. 786, at 794 as follows:

(1) Suppression by the prosecution after defense request.
(2) The favorable character of the evidence for the defense.
(3) The materiality of the evidence.

Of crucial importance is, of course, the meaning of the word material. The standard by which "materiality" is measured is a variable one, dependent upon the degree of the prosecutor's culpability in the non-disclosure. *Grant* v. *Alldredge*, 498 F.2d 376, 380 (2nd Cir. 1974).

Where there is deliberate prosecutorial suppression, the defendant need only show that the evidence is material and could in any reasonable likelihood have led to a different result on retrial. *United States* v. *Mele*, 462 F.2d 918 (8nd Cir. 1972); [Also see *United States* v. *Pacelli*, 491 F.2d 1108 (2nd Circ. 1974)].

In *United States* v. *Keogh*, (supra) the Court states:

> Deliberate prosecutorial misconduct is presumably infrequent; to invalidate convictions in the few cases where this is proved, even on a fairly low showing of materiality, will have a relatively small impact on the desired finality of judgments and will deter conduct undermining the integrity of the judicial system. The request cases also stand on a special footing; the

> prosecution knows of the defense's interest and, if it has failed to know this even in good faith, it has only itself to blame..." ...

As stated in *United States* v. *Miller*, 411 F.2d 825, 832 (2nd Cir. 1969 — Friendly, J.):

> "Negligence of the prosecutor in failing to make evidence available to the defense reduces the standard of materiality needed to require the granting of a new trial below the formulations applicable where no prosecutorial misconduct exists."

The Court in *Grant* v. *Alldredge* (supra) at 380 refers to *United States* v. *Miller* (supra) and states:

> "The test articulated there, and recently reaffirmed in *United States* v. *Pfinost*, 480 F.2d 262, 277 (2nd Cir. 1969), *petition for cert. filed*, 42 U.S.L.W. 3451 (U.S. Feb. 4, 1974), is that when the prosecution has been negligent in failing to make constitutionally mandated disclosures, a new trial should be granted if "there was a significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. *United States* v. *Miller* (supra) at 832. Of course, as the prosecutor's culpability increases from unavailable nondisclosure to negligent to deliberate suppression, prophylactic considerations designed to deter future prosecutorial misconduct begin to assume ascendant, and eventually paramount importance." (*United States* v. *Pfinost* at 277).

Footnote 5 follows the Court's explanation in *Grant* v. *Alldredge* (supra) of its interpretation of the phrase "developed by skilled counsel as it would have been." In this regard the Court states as follows at page 391:

> "It is instructive to note that the phrase "developed by skilled counsel as it would have been" does not necessarily restrict the scope of our inquiry to show how the "added item" would have been used at the trial itself but would rather seem to be of sufficient latitude to permit us to examine how defense counsel might have utilized his knowledge of the "added item" IN PREPARATION FOR trial."[5]

In footnote 5 at page 381 of *Grant* v. *Alldredge*, the Court refers to its ruling in *United States* v. *Polisi* pertaining to defense trial preparation as follows:

> "[5] In *United States* v. *Polisi*, 416 F.2d 573, 577 (2nd Cir. 1969) (emphasis inserted), we viewed the significance of *Brady*, which was not cited in *Miller* but concerns the identical problem of prosecutorial nondisclosure, as 'its holding that the concept out of which the constitutional dimension arises in these cases, is prejudicial to the defendant MEASURED BY THE EFFECT OF THE SUPPRESSION UPON DEFENDANT'S PREPARATION FOR TRIAL, rather than its effect upon the jury's verdict."

And the fact that disclosure of exculpatory evidence is finally made during trial may not be sufficient to avoid a violation of defendant's due process. In *Grant* v. *Alldredge* (supra) at footnote 7, page 382, the Court refers to the case of *United States* v. *Cobb*, 271 F. Supp. 159, 163 (SD NY 1967). In this regard the Court states:

> "'There may be instances where disclosure of exculpatory evidence for the first time during trial would be too late to enable the defendant to use it effectively in his own defense, particularly if it were to open the door to witnesses or documents requiring time to be marshalled and presented. *United States* v. *Cobb*, 271 F. Supp. 159, 163 (S.D.N.Y. 1967) (Mansfield, J.)

In *Grant* v. *Alldredge* (supra), while the prosecution did not furnish certain information to the defense pretrial, (i.e. that the bank teller had identified by photos one John Patrick Walsh instead of the defendant Grant as the bank robber), it was furnished at trial after the witness had testified on direct examination, in compliance with the Jencks Act. Other information concerning Mr. Walsh in the F.B.I. file which tended to connect him with the bank robbery was not released to the defense, however. Following Grant's conviction, at the hearing on the defendant's motion to vacate the judgment of conviction and to obtain a new trial, the United States District Court judge thought that "disclosure of Walsh's identity would not have materially aided in the preparation of a defense," since at the trial, when the prosecution revealed the certain information concerning the bank teller's identification by photo of John Patrick Walsh, the defense did not seek a continuance on the ground of surprise for the purpose of gathering additional material on Walsh. In this regard the Court in *Grant* v. *Alldredge* at page 382 states as follows:

> "Here it was imperative that upon request prior to trial the complete details of the Walsh identification by Miss Harris be disclosed. Although it may be that marginal *Brady* material need not always be disclosed upon request prior to trial, the fact that Miss

Harris had selected Walsh as a suspect was without question "specific concrete evidence for full exploration and exploitation by the defense. *United States* v. *Gleason*, 265 F. Supp. 880, 885 (S.D.N.Y. 1967) (Frankel, J.). This information, so withheld by the Government would have had a material hearing on defense preparation. *United States* v. *Eley*, 335 F. Supp. 353, 357 (N.D. Ga. 1972) quoting *United States* v. *White*, 50 F.R.D. 70, 73 (N.D. Ga. 1970), aff'd. 450 F.2d 264 (5th Cir. 1971), cert. denied. 405 U.S. 1072, 92 S. Ct. 1523, 31 L. Ed. 2d 805 (1972), and therefore should have been revealed well before the commencement of the trial. The district court thought that "disclosure of (Walsh's) identity would not have materially aided in the preparation of a defense." But, as we have said, the particular disclosure might have led, had it been made well in advance of trial, to the other significant information concerning Walsh. It was the district court's belief, however, that such an assumption is unwarranted for, when the information was eventually revealed at trial, the defense did not, on the ground of surprise, seek a continuance for the purpose of gathering additional material on Walsh. We refuse, however, to infer from the failure of defense counsel, when surprised at trial, to seek time to gather other information on Walsh, that defense counsel would have by-passed the opportunity, had the prosecutor apprised him of the Harris selection of Walsh at a time when the defense was in a reasonable pretrial position to evaluate carefully all the implications of that information? Given the time for preparation which counsel was denied by the belated disclosure, it seems to us counsel might have pursued a course of inquiry which would have resulted in ferreting out the relevant Walsh information."

The Court in *Grant* v. *Alldredge,* (supra) commenting upon what defense counsel might possibly have done had he been given the withheld information pretrial in time for pretrial investigation states at page 381:

> "Presumably, given the time for such an investigation, defense counsel here might have contacted Walsh himself. Also, counsel might have made more specific demands of the federal prosecutors for disclosures concerning Walsh, and the prosecutors may have then made concrete inquiries of the investigating F.B.I. Agents who it seems, at that point anyway, might have had a *Brady* responsibility to reply to any particularized defense motion for information concerning Walsh.

In *Grant* v. *Alldredge* (supra at 381, 382), the Court commented that it did not reach the issue of the responsibility of the United States Government for information contained in the local police reports since it was conceded by the Government that this information was known to the F.B.I. agents. In *United States* v. *Ahmad,* 53 F.R.D. 186 (D. Ct. Penn 1971) the Court held that the Government has a duty to use due diligence in obtaining exculpatory evidence from other Government agencies and that negligent non-disclosure violated due process.

In addition, the prosecutor must disclose to each attorney for each defendant, even if he believes that having made certain disclosure to one defense attorney, the other attorneys will learn of the information disclosed from the first attorney. The furnishing pretrial by Mr. Coffey, the prosecuting attorney, to Mr. Santos, defense attorney for Guillette, of copies of the photos of the prints lifted from the bomb device, allegedly believing that Mr. Santos would pass on this information to the other defense attorneys

or defendants, is insufficient to satisfy his obligation as the prosecuting attorney. In *United States* v. *Bamannon*, 430 F.2d 1060 (2nd Cir. 1970) the Court stated:

> "There is nothing lost if the Government disclosed the facts to each defendant even if they have already learned it from the first defendant, for if a defendant does not already know, then the Government's non-disclosure may result in a danger that a line of inquiry was foreclosed to the defense." *Ashley* v. *Texas*, 318 F.2d 80 (5th Cir.).

[Note 77 Harv. L. R. (1964)], involved a fact pattern similar to that in the instant case of Appellant Marrapese. In *Ashley* the appellant was convicted of murder and sentenced to death. He claimed that he was denied due process by the suppression of a report given to the prosecution by two psychiatrists indicating that Ashley was insane. Instead, the defense counsel was informed that another psychiatrist found Ashley sane. In this case, the suppressed information did not even relate to the only defense raised at trial — self defense. The Court ruled that this suppression amounted to a denial of due process because it adversely affected the preparation for trial.

In the instant case of Appellant Marrapese, the defendant had only A.T.F. Agent Varcos' November 18, 1972 report stating that the fingerprints were "unidentifiable." Counsel for the defense relied on this and prepared for trial under the misapprehension that the fingerprints found on the bomb could not be identified. Just as counsel in *Ashley* did not develop an insanity defense because he was lead to believe that the medical testimony would show Ashley sane, counsel for Marrapese did not develop an identity issue based on the fingerprints because they

were lulled into the belief that these fingerprints were "unidentifiable."

In *Barbee* v. *Warden, Maryland Penitentiary,* 331 F.2d 842 (1964), a ballistics report which would have tended to show that the gun in question was not the weapon used to fire at the officer in question was suppressed. The Court held this was error stating:

> "As Judge Edgerton said in *Griffin* v. *United States,* 87 U.S. App. D.C. 172, 183 F.2d 990, 993 (1950) the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. Where there is substantial room for doubt the prosecution is not to decide for the Court what is admissible, or for the defense what is useful."

In *Barbee,* the Government argued that defense counsel did not ask for the results of the test. The Court ruled, however, that the lack of a request is no excuse. In the instant case, defense motions were made prior to the trial of Joost and Guillette, and then again prior to the trial of Marrapese and Zinni, by all defense counsel for discovery, including all scientific reports "the existence of which is known, or by the exercise of due diligence may become known to the attorney for the Government", and for exculpatory evidence.

And in *Barbee,* the Court stated at 846:

> "Failure of the police to reveal material evidence in their possession is equally harmful to the defendant whether the information is purposely or negligently withheld. And it makes no difference if the withholding is by officials other than the prosecutor."

In *United States ex rel. Thomas Meers* v. *Wilkens,* 326 F.2d 135, 136 (1964) the Court affirmed a court order directing the discharge of a prisoner who had not been afforded the names of witnesses at his state trial, the Court stating:

> "Prosecution knew at the time of the trial that both these witnesses had the opportunity to see and observe circumstances which would have been material to the petitioner's defense, and that their testimony would have aided the petitioner in his defense. That they failed to disclose it either to the Court or to the petitioner or his counsel, that because of this failure to disclose important testimony, which would have been beneficial to the petitioner in his defense, the rights of the petitioner were prejudiced and an element of unfairness existed, which amounted to a deprivation of the petitioner's rights under the Federal Constitution."

In *United States* v. *Pacelli,* supra, (2nd Cir. 1974) the Court granted a new trial to a man convicted under the identical statute here charged (18 U.S.C. 241) holding that it was error for the Government to withhold an informant's letter which could have been used to impeach him. It is submitted that the withholding in the instant case is far more serious.

The issues become, was there prosecutorial suppression of material evidence in this case, and if so, was it deliberate or negligent? Appellant Marrapese suggests that a summary of the factors as previously set forth in detail be strongly considered on these issues.

(1) Pretrial motions for discovery of items, including all scientific reports, "the existence of which is known or by the exercise of due diligence may become known to the

attorney for the Government", and for exculpatory evidence, were made by defense counsel prior to both the Joost, Guillette and Marrapese-Zinni trials.

(2) It is conceded by the Government that at no time prior to the testimony of Connecticut State Police Fingerprint Expert, Lieutenant McDonald, in June 1974 during the trial of Appellant Marrapese and co-defendant Zinni, was Lieutenant McDonald's report of October 3, 1972 which stated his opinion that there were three "identifiable" partial latent prints found on the bomb device, revealed to any defense counsel or defendant, nor was any information, oral or otherwise, furnished that the prints, in Lieutenant McDonald's opinion, were "identifiable," or "looked good," or were prints that he could "work with."

(3) This was a joint State-Federal law enforcement agency investigation, as conceded by Mr. Coffey, the prosecuting attorney, in his testimony.

(4) Lieutenant McDonald testified that this 'find' of three "identifiable partial latent prints on the bomb device was an important one in this death case, something that he would not even consider keeping from his superiors, and in fact, he did relate this information to his superiors, to A.T.F. Agent Weronik, and to United States Attorney Paul Coffey, the federal prosecutor on this case at least on October 12, 1972 at the Federal Building in Hartford.

(5) Although A.T.F. Agent Weronik and Mr. Coffey both deny that the word "identifiable" was stated to them by Lieutenant McDonald, they both agree that Lieutenant McDonald told them that "the prints looked good" and that "they were something he could work with." And Mr. Coffey further conceded in his testimony that on October 12, 1972, when Lieutenant McDonald intermittently reported his progress in comparison efforts,

Lieutenant McDonald told him that "everything was going fine" and that this indicated to Mr. Coffey that both the latent prints found on the bomb and the new "major" sample prints furnished by the defendants and Edward Sitko on that date, October 12, 1972 were sufficient for comparison purposes.

(6) And Lieutenant McDonald testified that although he did not send his October 3, 1972 report to his superiors or to the federal agents or prosecuting attorney, since it was the practice at that time not to do so unless specifically requested and no one ever made the request of him, he did place this October 3, 1972 report in his 8" x 11" manilla folder file on this case on October 3, 1972, where it remained until June 1974, and both A.T.F. Agents Weronik and Varcos, the federal fingerprint expert, had access to this file, Agent Varcos going through it while he attempted to make comparisons at the State Crime Laboratory, Bethany, Connecticut commencing November 13, 1972 and for several days thereafter. The A.T.F. Agents would not admit to seeing this report, however.

(7) Unless Mr. Coffey either did know, or had reason to believe prior to October 12, 1972 that the three partial latent prints found on the bomb device were sufficiently clear for comparison purposes, it is respectfully submitted that there would be no logical reason why he would appear before Judge T. Emmett Clarie on October 12, 1972, and request and receive a Court Order for the rolling of further "major" fingerprint samples of the defendants and Edward Sitko for the purpose of comparing them with the three prints found on the bomb device. Common sense dictates an awareness of the content of this report of October 3, 1972; or would the Government have us believe that the prosecutor has psychic powers and/or engages in potentially idle and futile acts?

(8) Mr. Coffey admitted in his testimony that when

he received the pretrial discovery motions requesting scientific reports, the "existence of which is known or by the exercise of due diligence may become known to the attorney for the Government," that in exercising this due diligence requirement (a) he did not contact Lieutenant McDonald in any way to learn whether or not he had ever written a report or memo of any kind, and if so, the content of such, and (b) did not instruct any A.T.F. Agent or anyone else to contact Lieutenant McDonald for this purpose.

(9) Mr. Coffey's "half disclosure" (*Grant* v. *Alldredge* at 382) of copies of the latent prints from the bomb device to Mr. Santos, Attorney for Guillette, without either (a) furnishing him with Lieutenant McDonald's October 3, 1972 report, or (b) informing Mr. Santos of Lieutenant McDonald's original statements that he had found three "identifiable" partial prints, or "that the prints looked good" or that "they were something he could work with", was completely inadequate disclosure in itself. But when this "half disclosure" was coupled with Mr. Coffey's sending to Mr. Santos the report of A.T.F. Agent Varcos dated November 20, 1972, which report stated that the prints found on the bomb device were "unidentifiable" the resulting prejudice to defendant's cause was greatly magnified. Mr. Santos testified (a) that he relied completely on Mr. Varcos' report that the prints found on the bomb device were "unindentifiable," (b) that it was not his function to furnish the other counsel or defendants with the photographs of prints furnished to him by the prosecution, (c) that as a matter of fact, a conflict of interest existed between the defendants, and (d) that at no time, therefore, did he pass on to counsel for appellant Marrapese or co-defendant Zinni, or the defendants themselves, any of these fingerprint items furnished to him by the prosecution.

(10) Mr. Coffey testified that he was aware that I.R.S. Agent Smith, pursuant to Mr. Santos' motion, furnished to Mr. Santos a number of names of other persons against whom Mr. LaPolla had given information as to their alleged criminal activities, Mr. Santos testifying that there were approximately 8-12 names of individuals furnished. Mr. Coffey testified further that at no time was there a Government attempt to compare the prints lifted from the bomb device with prints of these 8-12 persons, or with anyone other than the defendants and Edward Sitko for that matter, nor were they sent to the F.B.I. lab in Washington for possible comparison with their voluminous files of fingerprint samples.

(11) At the trial of Joost and Guillette the prosecution's evidence was directed toward showing that Guillette had the skill and expertise in electrical components, and constructing home made burglar alarm systems, a form of anti-intrusion device, and also had purchased batteries and other electrical paraphernalia similar to that used in making the bomb device, and, therefore, Guillette must then have made the bomb. At the trial of Appellant Marrapese and co-defendant Zinni, the Government offered the same proof as to Guillette. In closing argument, Mr. Daniels, attorney for Appellant Marrapese argued that there was no evidence that either Marrapese or Zinni had anything to do with the making of the bomb and placing it at Mr. LaPolla's home in Oneco, Connecticut, and the prosecuting attorney then argued that the prosecution never contended that Marrapese or Zinni made the bomb, but that they acted in a "managerial" capacity. Thus, under this "managerial" theory Guillette was allegedly the agent of Marrapese and Zinni. Further, the prosecution argued to the jury that only these four defendants had a motive to kill Daniel LaPolla. A showing that Guillette's fingerprints were not on the bomb device would

have been very material at the Marrapese-Zinni trial since it attacked the very foundation of the prosecution's "agent-managerial" theory.

(12) Using the reasoning of the Court in *Grant* v. *Alldredge* (supra), if the appellant Marrapese and co-defendant Zinni had the information contained in Lieutenant McDonald's report pre-trial with adequate time for preparation, many avenues of investigation would have been explored. Defense counsel for Appellant Marrapese would have (a) requested copies of the October 3, 1972 report of Lieutenant McDonald (b) requested copies of the three partial latent prints found on the bomb device, (c) procured fingerprint experts to make comparisons, (d) requested a Court Order requiring the fingerprinting for comparison purposes of the other 8-12 persons against whom Mr. LaPolla gave information concerning their alleged criminal activities and who also had a motive to kill Mr. LaPolla, (e) requested the Court to order the printing of others in the criminal community in Rhode Island, New York and elsewhere, and this investigation may also have led to other further evidence connecting or implicating someone other than the defendants to this crime, (f) requested that Guillette and Joost give additional fingerprint samples since their "major" fingerprinting on October 12, 1972 was somewhat smudged according to Lieutenant McDonald, and then have it compared with the prints on the bomb device by Lieutenant McDonald and/or defense fingerprint experts. If this comparison indicated that it is not Guillette or Joost's prints on the bomb device this would be very strong evidence for Appellant Marrapese and co-defendant Zinni to rebut the agency-"managerial" theory relied on by the Government at both trials. (g) Also, under the above circumstances it would be argued to the jury that obviously some "unknown" person other than the four defendants

had a motive to kill Mr. LaPolla, and did, in fact, kill him, and further that the Government had made no efforts to find this person by sending the prints to the local police and the F.B.I. for possible comparison purposes.

In conclusion, Appellant Marrapese respectfully contends based upon the foregoing that the prosecution knew of the content of Lieutenant McDonald's October 3, 1972 report stating the prints on the bomb device were "identifiable," and deliberately suppressed this information, furnishing instead to the defense the November 20, 1972 report of A.T.F. Agent Varcos which states that the prints on the bomb device were "unidentifiable", upon which the defense relied. If for the sake of argument it is concluded that the prosecutor was merely negligent in failing to exercise due diligence and obtain this October 3, 1972 report from Lieutenant McDonald, or to at least inform the defense of the Lieutenant's opinion that the prints on the bomb device were "identifiable" or that the prints "looked good" or that "they were something he could work with," due to the favorable nature of this evidence to the defense and it's materiality, this prosecutorial suppression constituted a violation of due process. As far as materiality, A.T.F. Agent Weronik and the prosecutor himself admitted in their testimony that it would be important to both the prosecution and to the defense to learn that the prints on the bomb device were "identifiable" since this could lead directly to the identity of the person who made the bomb device, and could either inculpate or exculpate a defendant, going directly to the issue of guilt or innocence.

CONCLUSION

Under all the circumstances as outlined above, Appellant Marrapese respectfully urges that the Trial Court's denial of a new trial in this case is inconsistent with the correct administration of criminal justice in the Federal courts, *United States* v. *Miller,* (supra) at page 832, *United States* v. *Consolidated Laundries,* 291 F.2d 563 at 571, *Grant* v. *Alldredge,* (supra) at page 383, and resulted in a violation of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, and respectfully prays, therefore, that for the foregoing reasons this Honorable Court grant Appellant Marrapese's request for a New Trial of his cause.

Respectfully submitted,

By His Counsel,
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